

# **MEMORANDUM OF UNDERSTANDING BETWEEN THE COMPETENT AUTHORITIES OF CANADA AND THE UNITED STATES REGARDING FACTUAL DISAGREEMENTS UNDER THE MUTUAL AGREEMENT PROCEDURE**

The Competent Authorities of Canada and the United States agree to the following principles, guidelines and procedures to resolve disagreements in respect of the underlying facts and circumstances in cases that are referred to them under the mutual agreement procedure ("MAP") article of the *Canada – United States Income Tax Convention (1980)*, as amended from time to time (the "Convention").

## **Section I. Definitions**

In this Memorandum of Understanding ("MOU"):

"Appeals organization(s)" means either the Appeals Branch of the Canada Revenue Agency (CRA) or Appeals of the Internal Revenue Service (IRS), or both;

"CA or CAs" means either the Canadian or the U.S. Competent Authority, or both;

"Assistant Commissioner of Appeals" means the Assistant Commissioner, Appeals Branch, CRA or his/her authorized representative;

"Chief of Appeals" means the Chief of Appeals, IRS or his/her authorized representative; and

"Appeals Review Panel" ("ARP") means a joint panel comprised of officials of the respective Appeals organizations chosen by the Assistant Commissioner of Appeals and the Chief of Appeals.

## **Section II. Purpose and Scope of the MOU**

1. The purpose of this MOU is to establish an independent review process for resolving disagreements regarding the underlying facts and circumstances ("factual disagreement") of a specific MAP case for further negotiations by the CAs.

A factual disagreement is a disagreement concerning any of (i) whether a fact has occurred (e.g., whether a party made a payment or not), (ii) the relevance of a fact agreed to exist (e.g., if the payment was made, is that fact relevant to determining the transfer price for transactions covered by

the MAP case), or (iii) the significance to be accorded a fact agreed to exist (e.g., what significance should be given to the fact that a payment was made).

2. Unless the CAs otherwise agree this MOU will not apply to:

- MAP cases involving the interpretation of treaty provisions; and
- MAP cases involving taxpayers who fail to cooperate with either of the CAs in providing relevant information and data during the MAP process.

### **Section III. Independent Review Process**

1. Independent Review

- Except as provided in the second bullet of this part (III.1), if either CA determines that the CAs have been unable to agree on the underlying facts and circumstances of a specific MAP case within six months after the first face-to-face negotiating meeting for the case, the CAs must refer the case to the independent review process.
- If mutually agreed by the CAs, a referral to the ARP can be made at a date that is earlier or later than that provided in the first bullet of this part (III.1). Each CA agrees to consult promptly upon the request of the other CA for early or late referral.

2. Referral Request

- Unless the CAs mutually agree to a different referral date, each CA must refer any MAP case required to be referred under the first bullet of part 1 of this section (III) to its respective Appeals organization by no later than 30 days after the expiration of the six-month period referenced therein, or, if one or more face-to-face negotiating meetings for the MAP case were held prior to the full execution of this MOU, then by no later than 6 months plus 30 days after full execution of this MOU.
- Each referral will be in the form of a written submission prepared by the respective CA setting out in detail the nature of the factual disagreement and the views of the CAs.
- If the CAs mutually agree for any MAP case, they may make a joint referral request that does not disclose the country identity of the subject taxpayer(s), and, for such cases, alter the procedures set forth in this MOU.

### 3. Acknowledgement of Referral

Each Appeals organization will, within 30 days after the date that a referral request is made pursuant to part 2 of this section (III), advise its CA in writing of the receipt of the referral request and the identities of the individuals selected, pursuant to part 4 of this section (III), for the ARP for the subject MAP case.

### 4. Selection of the ARP

- The Chief of Appeals and the Assistant Commissioner of Appeals will each appoint one voting member from their respective Appeals organizations to the ARP. Those two individuals will have independent authority to resolve the factual disagreement involved in the MAP case. The Chief of Appeals and the Assistant Commissioner of Appeals may also appoint one or more non-voting member(s) from their respective Appeals organization to the ARP. The voting and non-voting members of the ARP will, collectively, be referred to as “Members”.
- Unless the CAs agree otherwise, no ARP Member may have had any previous involvement in an audit of the subject taxpayer(s) or in a resolution of objections filed by such taxpayer(s).

### 5. *Ex Parte* Contacts

- The ARP may request supplementary information/representation from any party possessing relevant information.
- There will be no *ex-parte* contact with Members of the ARP by either the CAs or the subject taxpayers or their representatives unless at the request of the ARP. If any prohibited *ex-parte* contact occurs, the Member who was contacted shall immediately disclose such contact to the voting Member(s).
- The work of the ARP is a government-to-government process. Accordingly, the Appeals organizations will not disclose their processes or findings to the subject taxpayer(s), the taxpayer'(s)' representatives or any person other than the CAs.

### 6. Meetings and Timeframe

- If the ARP requires face-to-face discussions, such discussions will be held in Ottawa or Washington, D.C., on an alternating basis.

- The ARP must conclude its work and render its decision by no later than 150 days after the date on which the referral request is required or agreed to be made pursuant to part 2 of this section (III). Either CA may grant an extension upon request by the ARP.

#### 7. ARP Decision

- If the voting members pursuant to part 4 of this section (III) agree on a resolution of the factual disagreement(s), the ARP will issue a written report that identifies the subject taxpayer(s), describes the factual disagreement(s), and summarizes the resolution of the factual disagreement(s). The CAs will follow the ARP's resolution of the factual disagreement(s).
- If the voting members pursuant to part 4 of this section (III) cannot agree on a resolution of the factual disagreement(s), each Appeals organization will provide a written explanation of its voting member's finding.

#### 8. Not to Be Used as Precedent

A decision by the ARP will not be considered as establishing a precedent for resolving other MAP cases.

#### 9. Appeals Process

No Members of this ARP should participate in any subsequent resolution of the subject MAP case.

### **Section IV. Other**

The CAs agree to publish this MOU to demonstrate their mutual commitment to improving the MAP process.

This MOU sets forth procedures to be applied in addressing MAP cases under the Convention. Nothing in this MOU shall be construed as affecting taxpayers' rights under applicable domestic law.

This MOU is not to be interpreted as creating or limiting any cause of action, rights or benefits in favour of third parties or taxpayers.

This MOU is effective when fully executed. It may be terminated at any time by either CA giving written notice to the other CA and it may be modified at any time by mutual agreement of the CAs.

The information furnished to the ARP is provided under the terms of the Convention, which governs its disclosure and use. For purposes of this MOU, the Members will be delegated as members of the staff of their respective CAs in accordance with their administrative procedures.

Competent Authority for Canada

Competent Authority for the United States

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Frederick R. O’Riordan  
Director General  
International Tax Directorate  
Canada Revenue Agency

Date: \_\_\_\_\_

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Robert H. Green  
Director – International  
Large and Medium Size Business  
Internal Revenue Service

Date: \_\_\_\_\_